***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# NO. 75-4016

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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P/S

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

DEE KNITTING MILLS, INC.; DIPPY KNITS, INC.;
and THREE D KNITTING MILLS, INC.,

*Respondent.*

On Application for Enforcement of an Order of
The National Labor Relations Board

# REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD


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3

# INDEX

## AUTHORITIES CITED

**Miscellaneous:**

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## REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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This reply is addressed to certain matters raised in the Company's brief:

1. The Company (Br. 11, 19) concedes, as it must, that its exceptions to the Administrative Law Judge's decision contained no mention of the Judge's Section 8(a)(2) findings and the vast majority of his myriad Section 8(a)(1) findings. Its assertion that it is nonetheless entitled to raise these matters before the Court is wholly unfounded. Section 10(e) provides that "No objection that has not been urged before the

Board . . . shall be considered by the Court . . . [absent] extraordinary circumstances." To guarantee that the Board will be apprised of the issues in the case with clarity and precision, the Board's Rules provide that any exception "not specifically urged shall be deemed to have been waived." 29 C.F.R. Sec. 102.46(b). Section 10(e) of the Act, therefore, normally bars the parties from raising in the Court of Appeals any issue to which specific exception was not taken before the Board. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953); *Marshall Field and Co. v. N.L.R.B.*, 318 U.S. 253, 255-256 (1943); *N.L.R.B. v. Park Edge Sheridan Meats, Inc.*, 323 F.2d 956, 959 (C.A. 2, 1963).

The Company's sole ground for its claim that these matters were preserved for court review is its statement in its second exception that "the Judge erred in wholly crediting General Counsel's witnesses" (A. 31). Clearly, this general credibility exception does not apprise the Board that the Company was urging the Board to reverse the Judge's aforementioned Section 8(a)(1) and (2) findings. If the Company meant to contest the merits of the Judge's Section 8(a)(1) and (2) findings, it was obliged to do so directly. Instead, the Company's broad attack on the Judge's credibility resolutions appears, if anything, to be aimed at explaining a basis for contesting its first exception, *i.e.*, the Judge's finding that the Company engaged in an unlawful mass discharge. In addition, the Company's inclusion of an exception dealing specifically with one Section 8 (a)(1) finding (A. 31) suggested that the Company was not excepting to the many Section 8(a)(1) findings left unmentioned.

Furthermore, contrary to the Company's contention (Br. 19), the Section 8(a)(2) findings do not turn on credibility; the facts surrounding the Company's unlawful assistance to and recognition of Local 550 after refusing to extend such recognition to the Union following its attainment of majority status are undisputed. The Judge's determination that Charles

Reina, who solicited the employees on behalf of Local 550, was a supervisor within the meaning of Section 2(11) is supported by the testimony of Reina himself, as well as that of the Company's employees revealing Reina's possession of indicia of supervisory status (A. 6, 14-15). See *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 999 (C.A. 2, 1973). Accordingly, by its failure to file specific exceptions, the Company waived its right to object to these Section 8(a)(1) and (2) findings.

2. In any case, in the Company's contentions concerning the merits of the aforementioned Section 8(a)(1) findings are, like its Section 8(a)(2) claims discussed above, devoid of substance. The Company acknowledges (Br. 13-14, 17-18) that many of these findings turn on credibility, and as shown in our opening brief (Br. 15), this Court has long recognized that credibility resolutions are for the Board. The Company's other arguments are also unavailing, as they are based on a misreading of the applicable law or the record. For example, with regard to the Board's findings that Supervisor Reina engaged in various unlawful interference with lawful employee picketing, the Company makes the wholly untenable legal assertion that ". . . an employer cannot be held responsible for a supervisor's actions unless there is some connection between him and management . . ." (Br. p. 16). This statement flies in the face of the long established principle that actions of supervisors are imputable to the employer. See *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870, 871-872 (C.A. 2, 1970), cert. denied, 402 U.S. 907. The two cases cited by the Company in this regard, *Boyle's Famous Corn Beef v. N.L.R.B.*, 400 F.2d 154, 169 (C.A. 8, 1968) and *N.L.R.B. v. Dayton Motels*, 474 F.2d 328, 330-331 (C.A. 6, 1973), both deal with employer responsibility for the actions of *non-supervisory* employees. Similarly, the Company's assertion that Salvatore DiBartolo, who ran into picketing employee with his car, "was in no way associated with Dee Knitting Mills" (Br. 17) is deliberately misleading inasmuch as it was stipulated (A. 3) that DiBartolo was Vice-President and Director of

Three Dee Knitting Mills. Three Dee, Dee Knitting Mills, and Dippy Knits were found to be a single employer (A. 3). Finally, the Company's attempt to cast its unlawful threats of plant closure as mere predictions of the likely consequences of unionization (Br. 16-17) is refuted by the statements themselves. The record shows that immediately following the mass discharge of union supporters on September 20, Company official Charles DiBartolo declared that he would "put a lock on the door before ~~the~~ a Union will get in here" (A. 11; 73). This unlawful threat echoed earlier remarks by Company officials the previous July at an anti-union Company meeting and prefigured Company statements the next day at a meeting with Union representatives that the Company would close its doors if it did not get its way (Opening Br. 3, 8). Such blatant threats of reprisals are plainly unlawful.

3. The Company (Br. 23-25) also attempted to refute the Board's finding that it violated Section 8(a)(3) and (1) of the Act by engaging in a mass discharge of union supporters upon presentation of the Union's demand for recognition. This rebuttal took the form of three equally unmeritorious lines of defense. First, the Company denied that it engaged in a mass discharge and claimed instead that the employees engaged in a walkout. As shown in our opening brief (Br. 15-16), this defense is based upon its challenge to the credibility resolutions made by the Board after careful consideration (A. 4-8, 10-12, 22-23, 33 n. 1), and the Company has not pointed to any extraordinary circumstances warranting overturning these findings. Second, the Company asserted that even if it did discharge these employees, its subsequent offer of reinstatement neutralized any discrimination.[1] However, the law is clear that where the

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[1] The only case cited by the Company in support of this proposition, namely *James Hoomian d/b/a Chicago Master Mattress and Furniture Co.*, 196 NLRB 579 (1972) is inapposite. There the Board reversed an Administrative Law Judge's finding that an otherwise unlawful discharge rescinded immediately thereafter was not under the circumstances a discriminatory discharge.

evidence shows employees are victims of an unlawful mass discharge by their employer, the Board is entitled to so find and order appropriate relief. See *N.L.R.B. v. International Van Lines*, 409 U.S. 48, 53 (1972). That the Company engaged in vicious and widespread unfair labor practices before, simultaneously with, and after the discharges casts grave doubt on the value of one Company official telling employees standing on the curb after the firing that they were rehired, especially when other Company officials at the same time were telling them that they were fired and should return to the "gutter where [they] belonged" (A. 12; 143, 155, 107, 102, 95, 73).[2]

Lastly, the Company's argument that its mass discharge ~~were~~ was somehow legitimized because ~~they~~ it ~~were~~ was "provoked and caused by unlawful Union conduct" is entirely without merit. There has been no showing by the Company that the Union acted illegally in making its recognition demand. Indeed, it is uncontested that the Union represented a majority of the employees when the Union sought recognition from the Company; and it is well-settled that the employees were entitled to put on Union buttons as a sign of support at the time Union committee sought recognition from the Company. *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803 (1945). That the Company's reactions may have been "predictable stems not from any possible entrapment" (A. 23), but from the Company's predisposition toward unlawful conduct as a means of forestalling unionization. Hence, it is clear that the Company violated Section

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[2] Similarly, the Company's feelers at the meeting with the Union committee the day after the strike about employees returning to work were paralleled by other Company statements not mentioned in the Company's brief that if they did not get their way in the discussion with the Union over settlement of the unfair labor practices, they would close the shop (A. 13; 160-161, 173-174, 74). In these circumstances and for the reasons discussed in our opening brief (Br. 15), it is not surprising that the employees supporting the Union continued their unfair labor practice strike, as they were entitled to do.

8(a)(3) and (1) of the Act by its mass discharge of Union supporters in reprisal for their legitimate exercise of their Section 7 right in supporting the Union in its attempt to obtain recognition as bargaining representative.[3]

## CONCLUSION

For the above reasons, as well as those presented in the Board's opening brief, it is respectfully submitted that the Board's order should be enforced in full.

Respectfully submitted,

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July, 1975.

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[3] None of the cases cited by the Company (Br. 25) in support of the above defense bear any resemblance to the case at bar as each involved union conduct designed to secure or which in fact secured either unlawful recognition of a minority union or a unit wider than that contained in the Board certification. In the instant case, on the other hand, the legitimate Section 7 activities of the Company's employees resulted in their discharge.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.
this 16th day of July, 1975.